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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 45

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM, ALSO MOTION TO DISMISS THE CROSS-APPEAL

Isaac E. Ferguson
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Attorney for appellants.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 557

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

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Appellees are prosecuting a cross-appeal from "that portion of the judgment entered herein on September 22, 1961, which provides: 'The action is dismissed on the merits.'". At

the same time, in their motion to dismiss the appeal, appellees urge that this court lacks jurisdiction of the appeal because the case was not within the "equity jurisdiction" of the district court.

The district court, as directed by this court on the prior appeal, heard and passed upon the case "on the merits." It was not error to obey the mandate of this court. The statement by the court that it might have disposed of the case in some other manner, if not precluded by the mandate of this court, is immaterial. Such statement does not negate the fact that the district court did exercise "jurisdiction of the subject matter of this suit and of the parties," by hearing the case and denying the relief prayed for by appellants. The district court having exercised jurisdiction to pronounce its judgment in the case, this court is empowered to review the judgment.

Three-judge court

Appellees contend further that this court lacks jurisdiction of the appeal because his honor, Judge Louis E. Goodman, one of the members of the three-judge district court, died September 15, 1961, and was therefore unable to sign the judgment. (Appellees' motion, p. 51.)

The contention is trivial. Trial of the case was held February 7 and 8, 1961, the three judges participating. The decision of the court was announced by the "Memorandum and Order" of the court dated July 12, 1961, signed

by the three judges. (Appellants' Jurisdictional Statement, " Appendix I.) Proposed findings and conclusions, prepared by the attorneys for the appellees, were submitted to the attorney for appellants on August 1, 1961, together with a proposed judgment order and proposed "Order re plaintiffs' motion to substitute and ruling on evidentiary matters. " Objections of plaintiffs to the proposed findings, conclusions and orders were filed August 4, 1961. On August 7, 1961, appellees filed a reply to appellants' objections. (Docket item No. 118, wherein it is also noted that on August 10, the proposed findings, conclusions and orders were lodged with the clerk.) Thus, the proposed findings, conclusions and judgment were before the court for a period of five weeks or more prior to the death of Judge Goodman. The notation by the court that Judge Goodman was unable to sign the documents because of his death does not indicate that he did not participate in the determinations made by the court.

Substantiality of the questions presented by the appeal

The present appeal brings before the court the same pleadings and evidence considered on the former appeal, together with additional evidence. The question of the substantiality of appellants' complaint was argued extensively in the briefs on the former appeal. (Appellants' brief, pp. 6-24, 42-51; Appellees' brief, pp. 3-8, 14-15, 29-34.) It was decided by this court that the claims asserted by appellants are substantial in nature. Upon the trial of the case after remandment, there was no refutation

of any of the evidence supporting the substantiality of appellants' complaint. Such refutation is not made by a bare finding (No. 13), unsupported by substantial evidence, that appellants have neither suffered nor been threatened with irreparable injury. No suggestion is made that there is available to appellants an effective remedy at law, rather than in equity. To treat as de minimus the past and prospective damage to appellants caused by arbitrary debarment of sale of their avocados in California is to flaunt the national policy manifested in the commerce clause of the federal constitution and in section 1337 of the Judicial Code.

Post-trial ruling on evidence

In the anomalous post-trial "Ruling on evidentiary matters" (Appellees' motion, pp. 43-44), it is declared that the depositions of the witnesses David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, also plaintiffs' exhibits 1 through 26, "are not admitted into evidence but have been considered by the court as an offer of proof by plaintiffs."

Upon the trial of the case, said depositions and exhibits were tendered and received in evidence, in no instance as "an offer of proof," with leave to appellees to make objections thereto in their post-trial memorandum. (Transcript of trial proceedings, pp. 28-29, 69, 189-191.) The final pronouncement by the presiding judge was: "They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if

it is necessary."

Appellees, in their post-trial memorandum, objected to the admissibility of the depositions in toto on the ground that it was not shown that the witnesses resided more than 100 miles away from the place of trial. The place of trial was Sacramento, California, and it appeared in the depositions of appellants' witnesses David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty that they resided in towns south of Miami, Florida. Furthermore, the depositions (including that of R. M. Wimbish, called by appellees) were taken pursuant to stipulation, invoked by appellees on their motions to dismiss the complaint, designated both by appellants and appellees as part of the record of the case upon the appeal to this court from the judgment of dismissal entered by the district court January 13, 1959. (No. 49, October Term, 1959.) Objections in detail were made also by appellees to the admissibility of various questions and answers in the depositions and to various exhibits introduced by appellants.

Answer to appellees' objections was made in the closing memorandum filed by appellants. The court, in its "Memorandum and Order" of July 12, 1961, stated: "The evidence has been heard, with the rulings on certain objections by defendants having been reserved. . . The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume,

arguendo, that the exhibits and depositions offered by plaintiffs are all admissible." (Appellants' Jurisdictional Statement, pp. 18-19.)

Without attempt to construe the court's enigmatic statement, two things are clear: (1) that the court did not sustain any of appellees' objections to the admissibility of the depositions, in whole or in part, or to the admissibility of any of appellants' exhibits; (2) that the court gave such consideration as it deemed necessary to all of said evidence. Since objections to the admissibility of evidence that are not ruled upon by the court are in effect overruled, the record is devoid of support for the post-trial declaration that the depositions and exhibits to which objection was made "are not admitted in evidence." Appellees state in their motion to dismiss (p. 6) that appellants do not contest the correctness of the ruling of the trial court excluding certain exhibits from evidence, but fail to indicate any ruling by the court on appellees' objections to the admissibility of the specified exhibits. *

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* It is erroneously stated by appellees (Motion, p. 5) that exhibit 23 was excluded from evidence. When the exhibit was marked for identification, but before it was offered in evidence, the presiding judge interjected: "We are not going to encumber the record with things like this, so I will sustain the objection that was made to this exhibit," no objection then having been made. (Transcript of trial

(Continued)

The cross-appeal

The questions presented on the cross-appeal (Cross-Appellants' Jurisdictional Statement, p. 3) have already been adjudicated by the court, wherefore appellants submit that the cross-appeal should be forthwith dismissed.

Respectfully submitted,

Isaac E. Ferguson,

Attorney for appellants.

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* (Continued)

proceedings, p. 31.) When plaintiffs' exhibit 23 was offered in evidence, along with exhibits 24, 25 and 26, the presiding judge announced: "We will reserve ruling on that." (Transcript, p. 69.) The objections of appellees' to exhibits 23, 24, 25 and 26, made in appellees' post-trial memorandum and answered in appellants' closing memorandum, were never ruled upon by the court.